

Suggestions to improve Vietnamese Investment Law following some foreign investment legal regulations

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Abstract

Vietnamese Law on foreign investment contains all provisions related to foreign investment in Vietnam and investment from Vietnamese businesses abroad. Although the Vietnamese policies on foreign investment have been regularly amended and supplemented, some inadequacies affect the attractiveness of Vietnam as a foreign investment destination. These inadequacies are in the 2020 Law on Investment provisions, the 2012 Law on Cooperatives, Decree No. 01/2021/ND-CP on business registration compared with the 2020 Law on Enterprises, and the Civil Procedure 2015. Specifically, according to current provisions, foreign investors cannot establish sole proprietorships and business households in Vietnam. If the investor is a non-resident individual in Vietnam or a foreign legal entity, they are not allowed to launch or become a member of a cooperative in Vietnam; regarding investment registration certificate when foreign investors show economic organizations in Vietnam; regarding dispute settlement mechanisms in investment activities of foreign investors in Vietnam, etc. Therefore, this article makes recommendations on amending and supplementing the above provisions. It contributes to promoting investment attraction policies and creating equality between foreign and Vietnamese investors in investment activities in Vietnam.

Keywords: acquisition of shares, capital contribution, foreign investment, investment attraction, investment procedures, purchase of contributed capital.

1. Introduction

Vietnam has passed more legislation on foreign investment, making the country an attractive foreign investment destination. The policies deal with issues like the requirements for setting up a business, how capital is raised, the purchase of shares, how the raised capital can be utilized, and the procedures to use while investing. Despite these positive steps, some shortcomings hamper foreign investment. Therefore, studying the

shortcomings and limitations of Vietnamese Law and making recommendations for improvement are crucial in improving Vietnam's competitiveness in foreign investment attraction.

Foreign Direct investment involves multinational companies investing in countries other than where they have been incorporated. The multinational companies can opt for joint ventures or go for the option of setting up a subsidiary. This form of investment differs from portfolio investment because unlike portfolio investment because this is a long-term investment that involves holding a controlling stake in the company. (Lee, 2019, p.36)

According to Maxim (2014), ASEAN economies have benefited greatly from foreign direct investment (FDI) in the past twenty years. Foreign companies investing in ASEAN economies have brought technological know-how and a lot of capital. Japan and Chinese Taipei have been significant sources of FDI for the ASEAN nations. The Organization for Economic Cooperation and Development (OECD) has also been a source of FDI, with the US and Europe being the primary source. Developing economies have been greatly boosted in their growth trajectory by Multi-national Nations Conference on Trade and Development (UNCTAD) 2021 report showed that ASEAN countries benefited greatly from FDI in the years 2020/21. 2019 was the best year in FDI history for ASEAN economies, with a capital injection of USD 182 billion, effectively making ASEAN the biggest beneficiary of FDI among developing countries. However, there was the catastrophic impact of the COVID-19 pandemic that hit all the economies in the world. ASEAN was no exception and suffered a USD137 billion drop in FDI (UNCTAD, 2021, p3) Moreover, ASEAN countries were set to adopt the "ASEAN Investment Facilitation Framework" in development in 2021. The framework creates principles (although not legally binding) meant to (i) Make sure that the principles governing foreign direct investment in ASEAN are transparent and accessible to all foreign investors. (ii) To streamline all forms of unnecessary bureaucracy that hinder foreign direct investment in ASEAN and; (iii) Formulate policies that would define ASEAN as a lucrative foreign direct investment destination

(UNCTAD, 2021, p.56).

Further, UNCTAD (2021, p.71) reports that ASEAN economies have continuously made policies encouraging FDI. The report noted that in 2019-20 ASEAN economies made strides in passing policies that created a conducive environment for business and industrialization. Noting the importance of special economic zones (SEZs) and industrial estates in economic growth, ASEAN countries enacted measures encouraging FDI in the two sectors.

Vietnam must streamline its FDI laws with the other ASEAN countries to attract capital flow. Mohamad (2019) says that ASEAN countries noted

the importance of the free flow of capital among the member countries. As a result, they formed "The Working Committee on Capital Account liberalization." The committee's key mandate was to oversee the implementation of priority areas as per the ASEAN Economic Community (AEC) blueprint. Moreover, there was a need to streamline the region's equity markets, which was to be achieved under the stewardship of the ASEAN Capital Markets Forum (ACMF). ACMF was tasked with ensuring domestic laws and guidelines are harmonized and creating the infrastructure for integrating the region's markets.

2. Methodology

This article is based on based library research. It involves collecting and analyzing published literature on the research topic (literature review). Published works such as journal articles, reports, and books were the primary source of the data that was used in the writing of this article. "A literature

3. Findings and Discussion

3.1 An Overview of Foreign Direct Investment laws in ASEAN countries.

Most of the developed economies do not have laws governing FDI. Also, in line with this trend, Singapore (An ASEAN country) does not have an investment law. Singapore has been attracting the most FDI from all ASEAN countries (Bonnitcha 2017, p.3).

Among ASEAN countries, the FDI laws that have been adopted in the individual nations serve different roles from one country to the other. In Vietnam, The Law on Investment outlines restrictions and regulations for investors. It also deals with incentives for investors and matters to do with Vietnamese companies investing outside Vietnam. Malaysia has the Promotion of Investment Act. The act has been crafted to outline incentives that would make Malaysia a preferred FDI destination. In the case of Thailand, the country has two laws that deal with investment. Thai Foreign Business Act is a law that covers all forms of restrictions and regulations regarding FDI, while the Thai Investment Promotion Act outlines the incentives that foreign investors enjoy when they invest in the country (Bonita, 2017, p.3)

Bonitcha (2017, p5-20) looked at FDI laws in ASEAN countries and came up with the summary below:

(i)In Brunei, FDI is not governed by one specific law. The country uses different laws as well as policies that guide FDI;

(ii)Cambodia uses for FDI the "Cambodian law on Investment" (1994), and it was amended in 2003. Cambodia applies the concept of a

"negative list" regarding FDI. The law also deals with the specifications to be followed in awarding incentives;

(iii) Indonesia has an FDI law that was passed in 2007. The law stipulates the procedure for setting up new investments, the kind of incentives to be enjoyed, the rights investors are entitled to, etc.

(iv) Laos, on its part, uses an FDI known as "The Lao Law on Investment promotion," passed in 2009. This law stipulates the requirements for establishing new investments and the incentives investors would enjoy. Surprisingly, the law also deals with creating Special Economic Zones (SEZs), a phenomenon uncommon in the ASEAN region.

(v) In Malaysia, FDI regulations are spread across several laws. Some laws regulate specific industries, e.g., the Industrial Coordination Act (1975). This law governs the operations and investment within the manufacturing sector. Some other laws are general, like the "Environment Quality Act" (1974). Therefore, Malaysia does not have a dedicated law on FDI. Nonetheless, the "Promotion of Investments ACT"(PIA)- (1976), which is dedicated to incentives for investment, is what the country uses in place of FDI laws.

(vi) In 2014, Myanmar began the work of passing the "Myanmar Investment Law" (MIL). The law came into force in October 2016. This law replaced its predecessors "The Foreign Investment Law (FIL) of 2012 and the 2013 "Myanmar Citizen's Investment Law" (MCIL). The core function of the two laws was to outline how new investors would be approved by "Myanmar Investment Commission" (MIC). Also, the law created a framework for incentives to be given to investors who were approved by the MIC;

(vii) The Philippines has two laws that govern investments. The 1991 "Foreign Investments Act" deals with FDI only. It sets a regulatory framework for FDI pegged on "negative lists." The "negative" lists concept outlines sectors where foreign investors are prohibited from venturing. Then the "Omnibus Investments Code"(OIC) of 1987. This law covers both FDI and local investors. It also (in Chapter II) sets out the legal framework under which the "Philippines Board of Investment" works and promotes investments and incentives to investors. Also, the Philippines has numerous "Special Economic Zones" (SEZs), which fall under the "Special Economic Zone Act" of 1995, which is concerned with investments and incentives to investors.

(viii) As seen earlier, Singapore has neither a specific law on FDI nor Domestic investors. Investment in the country is regulated by laws that cut across various sectors. The critical point is that in Singapore that both Foreign and domestic investors are treated the same in Singapore.

(ix) In Thailand, investment falls under two laws.FDI in Thailand is regulated using "negative lists." These "negative lists" outline sectors

where foreign companies cannot invest. This is done under the "Foreign Business Act" (FBA) of 1999. Moreover, Thailand has other laws that vary from sector to sector. For example, the "Financial Business Act" (2008). The second primary law is the 'Investment Promotion Act (IPA) of 1977, which gives the legal framework for the operation of the "Thai Board of Investment." This law covers issues to do with incentives for investors. Bonnittha (2017, p.25) also says that investment laws have different purposes from one ASEAN country to another. . Some ASEAN member states use FDI laws to create a framework for approving the establishment of new investments. Some countries use investment laws to create guidelines for giving incentives to investors. Some countries use the same laws for FDI and domestic investors. The framework of investment laws is not rigid. This is evident in that some ASEAN member states countries have many laws governing foreign direct investment while others don't.

3.2. Vietnam

Vietnam's Law on Investment stipulates a limited set of investor rights, including:"

- (i) Vietnam has legislated under this law that it will protect investors. It will not take any administrative measures to nationalize its assets.
- (ii) The law has also protected foreign investors from some types of performance expectations.
- (iii) Also, foreign investors are guaranteed to be free to transfer the proceeds of their investments to their home countries without any unnecessary hindrances or bureaucracy.
- (iv) Vietnam also has a regime whereby it gives foreign investors incentives in certain circumstances. Under this law, foreign investors are assured that the incentives cannot be canceled during the life of their projects in Vietnam. (Bonnittha 2017, p.24)

3.2.1 Provisions on the establishment of sole proprietorships, business households, and cooperatives in Vietnam

Provisions for investors establishing economic organizations in Vietnam have shown inadequacies, especially for foreign investors establishing sole proprietorships and cooperatives in Vietnam.

Firstly, foreign investors cannot establish and own sole proprietorships and business households in Vietnam.

According to the 2020 Law on Enterprises, "a sole proprietorship is an enterprise owned by a single individual whose liability for its entire operation is equal to their total assets" (Clause 1, Article 188 of the 2020 Law on Enterprises). According to Article 17 of the 2020 Law on Enterprises, foreigners are not prohibited from establishing sole proprietorships. However, Clause 22, Article 3 of the 2020 Law on

Investment stipulates that a "foreign-invested economic organization" is a business operating within Vietnam and has some shareholders who are not Vietnamese citizens. Thus, foreign investors can establish economic organizations; foreign investors can establish economic organizations; in Vietnam if they become members or shareholders. In other words, when selecting a business in Vietnam, foreign investors are only legally allowed to set up limited liability companies, joint-stock companies, and partnerships. It is because foreign individuals and organizations (foreign investors) are called members or shareholders of these companies.

The Law on Enterprises 2020 that foreigners are not allowed to establish sole proprietorships, is indirectly regulated, although not mentioned in Clause 2, Article 17. Specifically, according to Article 17 of this Law, exclusive proprietorship registration documents only include the form filled out while registering the business and duplicates of statutory documents reflecting the business ownership. On the other hand, the enterprise registration documents of all companies (from Article 20 to Article 22) include duplicates of the "Certificate of Investment Registration"; this is a statutory document that is acquired through the laid down process under the "Law on Investment".

Besides, Vietnamese Law does not allow foreign investors to establish and own business households in Vietnam. Specifically, on business registration, Decree No. 01/2021/ND-CP, dated January 4, 2021, "A household business is established by a single individual or family members. its liabilities are pegged on the owner's property. If household members register as business households, one member will be authorized to act as the business household representative. Individuals who register business households, the person authorized to act as the business household representative, is the household business owner" (Clause 1, Article 79). This document only allows "individuals, household members who are Vietnamese citizens with full civil act capacity under the provisions of the Civil Code have the right to establish business households" (Clause 1, Article 80). Therefore, based on this regulation, foreign investors do not have the right to register the establishment of business households in Vietnam.

The main reason why Vietnamese Law does not allow foreign investors to establish sole proprietorships and business households in Vietnam is that the Law provides for unlimited financial liability on the property of the sole proprietorships' owner. For the entire operation of the enterprise and liability for all assets of the individual or household member establishing the business household for the whole process of the business household.

However, not allowing foreign investors to establish sole proprietorships or business households due to unlimited liability is unreasonable and inconsistent among Vietnamese law provisions. Specifically, a foreign

investor can be a partnership's general partner if he is indirectly acknowledged in the enterprise registration documents for collaboration, Clause 5, Article 20 of the 2020 Law on Enterprises. It means that if a foreign individual invests as a general partner, they will be liable for "liabilities accrued by the company," which is equivalent to their entire property. (specified at point b, Clause 1, Article 177) and also If the assets of the partnership are exhausted while paying its liabilities, then the new general partner will, together with other partners offset the remaining debt (specified at Point dd, Clause 2, Article 181).

Thus, regarding liability, it can be concluded that a partnership's general partner has higher liability for assets than the owner of a sole proprietorship and a business household. Besides having unlimited liability for investments, a general partner must also have joint liability for purchases with other general partners. The following example shall indicate the inadequacies of recognizing the right to establish a partnership as a general partner but recognizing the right to establish a sole proprietorship and business household for foreign investors. Two foreigners as foreign investors jointly establish a partnership. Thus, according to the 2020 Law on Enterprises provisions, both have unlimited liability for assets and are jointly liable for the entire operation of the enterprise. However, when both use all purchases to be responsible for the business operations, the legal consequences are the same as a sole proprietorship or business household owner having no more assets to pay remaining debts.

"Foreign-invested economic organizations with foreign investors that establish or contribute capital, acquire shares or contributed capital". Stemming from the above inadequacies, the Law on Investment should be amended and supplemented with provisions on foreign-invested economic organizations in this direction. If the definition is amended, foreign investors can be equal to domestic investors in establishing businesses in Vietnam, including setting up sole proprietorships. In addition, Decree No. 01/2021/ND-CP should be amended to allow foreign investors to develop business households in Vietnam when meeting other market access conditions under the Vietnamese Law on investment provisions.

Secondly, foreign investors illegally residing in Vietnam or foreign investors who are legal entities are not allowed to establish and become members of cooperatives.

According to Vietnamese Law, a "Cooperative is a collective economic organization, co-ownership with a legal entity, and is established voluntarily by at least seven members and mutually cooperate and assist in the production, sales, and job creation to meet the general needs of all members, based on self-control, self-responsibility, equality and democracy in the management of cooperative" (Clause 1, Article 3 of the

2012 Law on Cooperatives). Accordingly, Vietnamese Law only accepts cooperatives, including Vietnamese citizens, foreigners legally residing in Vietnam, households with a legal representative by the Law, and Vietnamese legal entities (Clause 1, Article 13 of the 2012 Law on Cooperatives). This means a foreign investor not residing in Vietnam and a foreign legal entity will not establish and become cooperative members.

The provisions mentioned above are no longer suitable for developing the 4.0 scientific and technological revolution and the period of the deep economic integration of Vietnam. The Law on Enterprises allows foreign investors not residing in Vietnam to establish and manage businesses in Vietnam. Hence, foreign investors must live in Vietnam to establish and be cooperative members legally. Similarly, the Law on Enterprises allows foreign legal entities to set up businesses and become members and shareholders of companies in Vietnam. However, the Law on Cooperatives only allows Vietnamese legal entities to become members of Cooperatives. This does not encourage foreign investment in Vietnam, limiting investment opportunities for foreign legal entities in cooperatives.

Therefore, to encourage investment to create more opportunities and investment models for Vietnamese foreign investors, Vietnamese Law should be extended for foreign investors not residing in Vietnam and foreign legal entities to establish and cooperate in Vietnam.

3.2.3 Provisions on Investment Registration Certificate when establishing economic organizations in Vietnam

According to the 2020 Law on Investment, an “investment registration certificate” is a document (paper or electronic) containing information regarding an investor's registered business. “Before establishing an economic organization, a foreign investor must have an investment project and shall carry out procedures to apply for an investment registration certificate, except for establishing small and medium-sized innovation startup enterprises and investment funds under the Law on supporting small and medium-sized enterprises” (Clause 1, Article 22). This regulation coincides with the 2020 Law on Enterprises on business registration documents for Limited Liability Companies, partnerships, and joint-stock companies. All of which must have duplicates of the “Certificate of Investment Registration of foreign investors” as prescribed by the Law on Investment (Article 20, Article 21, and Article 22).

However, investing in capital contribution, acquisition of shares, and purchase of capital contribution of economic organizations, the 2020 Law on Investment does not require foreign investors to have an “investment project and an investment registration certificate,” but the following conditions: (i) They must meet all the preconditions set for

foreign investors before they enter the Vietnamese market according to Art. 9 of the Law on Investment 2020 (ii) They should not engage in any activity that poses a risk to Vietnam's national security. (iii) Foreign investors must also abide by the regulations set out in the law governing land acquisition and land use in Vietnam. (Clause 2, Article 24). In other words, if a foreign investor contributes capital, acquires shares, or has a capital contribution to a previously established enterprise, they are not required to have an “investment project and an investment registration certificate.” Therefore, if the foreign investor does not want to do the task and apply for the investment registration certificate, they have the Vietnamese investors establish an economic organization. Then, they will participate in capital contribution, acquisition of shares, and acquisition of capital contribution under the conditions prescribed by the current Law on Investment (Article 26). Thus, in this case, the purposes and requirements forcing foreign investors to have a project and apply for the investment license to establish or participate in establishing an economic organization will not be met.

Stemming from the above inadequacies, the 2020 Vietnamese Law on Investment should eliminate the requirement that foreign investors have an “investment project” and apply for the “investment registration certificate” before setting up or participating in an economic organization in Vietnam. Especially when the investor meets the market access conditions under current provisions. This elimination will create equality between domestic and foreign investors when jointly establishing economic organizations in Vietnam. Eliminating this provision will not affect Vietnam's sovereignty, security, morality, and social ethics. Under current requirements, if foreign investors wish to become members or shareholders of economic organizations in Vietnam without doing projects and applying for an Investment Registration Certificate, they will contribute capital, acquire shares, or a capital contribution to a previously established enterprise. They must complete the procedures for registering capital contributions to develop claims and contribute capital in certain cases (Article 26 of the 2020 Law on Investment).

3.2.4. Provisions on dispute settlement mechanisms in business investment operations in Vietnam

First, disputes between investors, one of which is a foreign investor.

The Law on Investment 2020 envisaged a situation where disputes might arise between the investors in a company. In a situation where a dispute arises, and one of the investors is not a citizen of Vietnam, legally recognized institutions arbitrate on the matter. The disputing parties can seek recourse within the Vietnamese judicial system (courts); they can also use one of Vietnam's arbitration agencies; further, they have the option to seek the assistance of an international arbitrator; finally,

disputing parties can come into an agreement whereby they set up a tribunal that will arbitrate the dispute. (Clause 3, Article 14).

According to the above provisions, when a dispute occurs in the investment of foreign investors in Vietnam, there will be no dispute settlement mechanism in foreign courts. Meanwhile, the 2015 Civil Procedure Code Article 440 recognizes the jurisdiction of foreign courts to settle disputes in the following cases: (i) When the case in question goes beyond the purview stipulated for the Vietnamese judicial system under the code's article 470; (ii) Foreign courts could also adjudicate matters that fall with the code's article 469 if they meet the following preconditions: (a) If the defendant does not challenge the foreign court's jurisdiction; (ii) Recognition that Vietnam is not obligated to recognize and enforce the ruling of the foreign court; (iii) In an instance that the civil case was admitted by a foreign court before it was brought to a Vietnamese court meanwhile, disputes involving foreign investors are not always dealt with under the exclusive jurisdiction of Vietnamese courts, as provided for in Article 470 of this Code.

The contradiction between the two legal documents has not been clarified by Vietnamese Law. Therefore, when a dispute in Vietnam is filed by a foreign investor in a foreign court, it may be challenging to recognize and enforce the judgment in Vietnam. Therefore, to contribute to attracting foreign investment, Clause 3, Article 14 of the 2020 Law on Investment should be amended following the jurisdiction of foreign courts and the separate jurisdiction of Vietnam's courts under provisions of the 2015 Civil Procedure Code. Specifically, it is necessary to amend that disputes between investors, a foreign investors shall be settled through court or arbitration under stipulations of the Civil Procedure Code and the Law on Commercial Arbitration.

Second, disputes involving a foreign investor and a Vietnamese regulatory body.

According to the 2020 Law on Investment: when a dispute arises between a Vietnamese regulatory body and a foreign investor concerning business operations within Vietnam, the same will be arbitrated either by a Vietnamese arbitrator or a Vietnamese court. The only exception to this rule is whereby a contract stipulating a different dispute settlement mechanism exists or there is an international agreement to which Vietnam is a signatory prescribes a contrary dispute settlement mechanism. (Clause 4, Article 14). This provision shows progressiveness because of allowing a foreign investor to agree under a contract with a regulatory agency of Vietnam to use dispute settlement mechanisms other than Vietnam's arbitration or Vietnam's courts. However, the Civil Procedure Code 2015 stipulates that: if lawsuits involving rights to properties are immovable in the Vietnamese territory, they shall fall under the exclusive jurisdiction of the Vietnamese courts (Article 470).

Thus, if a dispute between a foreign investor and a regulatory agency of Vietnam is related to business investment activities involving rights to properties being immovable and construction works, it shall fall under the exclusive jurisdiction of the Vietnamese courts. Therefore, a regulatory agency of Vietnam cannot agree with a foreign investor to assign a foreign court to settle this dispute. However, as analyzed above, Clause 4, Article 14 of the 2020 Law on Investment, allows regulatory agencies and foreign investors to agree on a dispute settlement mechanism, including assigning foreign courts for settlement. However, suppose the 2020 Civil Procedure Code is applied. In that case, the agreement to appoint a foreign court to settle disputes can only be accepted when such arguments are not on Vietnam's courts' list of exclusive jurisdictions.

Therefore, for foreign investors to be clear and transparent in the dispute settlement mechanism related to investment in Vietnam, Clause 4, Article 14 of the Law on Investment in 2020 should be amended as follows: "Every dispute between a foreign investor and a regulatory agency over business investment activities within Vietnam's territory shall be settled by Vietnam's arbitral tribunal or Vietnam's court. Each party has the right to choose another agency or organization under the contract unless otherwise agreed under a contract or prescribed by an international agreement to which the Socialist Republic of Vietnam is a signatory".

4. Conclusion

In investment operations, the top concern of foreign investors is the legal corridor for foreign investment in the host country. Therefore, Vietnamese Law has made much progress in building and creating a clear and favorable legal gallery for investors. However, up to now, some provisions on investment conditions, procedures, and dispute settlement mechanisms applied to foreign investors have shown inadequacies. Therefore, it is necessary to continue to amend and supplement relevant provisions as analyzed above to enhance the equality between foreign and domestic investors and ensure the issues related to Vietnam's security and morality.

Also, Vietnam to pass legislation that draws foreign investments by offering incentives that will make it a more attractive foreign investment destination than the other ASEAN nations, e.g., tax breaks, ease of setting up businesses, and joining cooperative societies. However, the government should also be keen not to stifle sectors that Vietnamese nationals can effectively take.

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